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IN THE
SUPREME COURT OF THE UNITED STATES

No. 88-6677

October Term 1988

HORACE BUTLER,

Petitioner,

vs

JAMES AIKEN, WARDEN, AND THE ATTORNEY GENERAL OF SOUTH CAROLINA, T. TRAVIS MEDLOCK,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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RESPONDENTS' QUESTION PRESENTED

I.

Whether the situation presented where a suspect never requested the assistance of counsel during any interrogation, though counsel had met with the suspect prior to the interrogation, is factually distinguishable from Arizona v. Roberson, __U.S.__, 108 S.Ct. 2093 (1988)?

II.

Whether Arizona v. Roberson, supra, is to be applied retroactively to cases on federal habeas corpus review at the time the decision was announced?

TABLE OF CONTENTS

	Page
Respondents' Questions Presented . .	i
Table of Contents	ii
Table of Authorities	iii
Citation to Opinions Below	1
Jurisdiction	2
Constitutional Provision Involved	2
Counter-Statement of the Case	2
How the Federal Question Was Decided Below	6
Reasons Why the Writ Should Be Denied	8
Conclusion	16

TABLE OF AUTHORITIES

CASES:	Page
Allen v. Hardy, __U.S.__, 106 S.Ct. 2878 (1986)	7
Arizona v. Roberson, __U.S.__, 108 S.Ct. 2093 (1988)	Passim
Blum v. Bacon, 457 U.S. 132 (1982)	8
Boles v. Foltz, 816 F.2d 1132 (6th Cir. 1987)	11
Butler v. Aiken, 846 F.2d 255 (4th Cir. 1988)	Passim
Connecticut v. Barratt, 479 U.S. 523 (1987)	11
Colorado v. Spring, 479 U.S. 564 (1987)	9
Edwards v. Arizona, 451 U.S. 477 (1981)	Passim
Francis v. Franklin, 471 U.S. 307 (1985)	14
Lofton v. State, 471 S.E.2d 1294 (Fla. App. 1985)	14
Mackey v. U.S., 401 U.S. 667 (1971)	13, 15
McFadden v. Commonwealth, 300 S.E.2d 924 (Va. 1983)	14
Maine v. Moulton, 474 U.S. 159 (1985)	10
Michigan v. Jackson, 475 U.S. 625 (1986)	10
Miranda v. Arizona, 384 U.S. 436 (1966)	Passim
Roper v. State, 375 S.E.2d 600 (Ga. 1989)	11
Sandstrom v. Montana, 442 U.S. 510 (1979)	14
Shea v. Louisiana, 470 U.S. 51 (1985)	14
Solem v. Stumes, 465 U.S. 638 (1984)	5
State v. Butler, 277 S.C. 452, 290 S.E.2d 4 (1982)	4
State v. Dampier, 314 N.C. 292, 333 S.E.2d 230 (1985)	14
State v. Newton, 682 P.2d 295 (Utah 1984)	14
Teague v. Lane, __U.S.__, 44 CRIM.L.RPTR. 3129 (February 22, 1989)	Passim
Truesdale v. Aiken, 480 U.S. 527 (1987)	13
U.S. v. Halliday, 658 F.2d 1103 (6th Cir. 1981)	11
U.S. v. Missler, 414 F.2d 1293 (4th Cir. 1969)	11

CASES:	Page
Washington v. Yakima Indian Nation, 439 U.S. 463 (1979)	8
Wyrick v. Fields, 459 U.S. 42 (1982)	11
Yates v. Aiken, 484 U.S.__ (1988)	14
UNITED STATES CODE:	
28 U.S.C. § 1257(3)	2
28 U.S.C. § 2254	5
UNITED STATES CONSTITUTION:	
Fifth Amendment	Passim
Sixth Amendment	Passim

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The Respondents, above named, hereby make Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and would present the following:

CITATION TO OPINIONS BELOW

The opinion of the District Court for the District of South Carolina, Butler v. Aiken, C/A No. 86-1093-3 (D.S.C. June 9, 1987), denying Butler's Petition for a Writ of Habeas Corpus is unreported, and may be found at J.A. 1606. A copy of the District Court's opinion is attached to the Petition as Appendix A. The initial panel opinion of the United States Court of Appeals for the Fourth Circuit, affirming the denial of a Writ of Habeas Corpus, is reported as Butler v. Aiken, 846 F.2d 255 (4th Cir. 1988), and is attached to the Petition as Appendix B. The Order of the

Court of Appeals denying rehearing and rehearing en banc is unreported. Butler v. Aiken, No. 87-4004 (4th Cir. June 15, 1988). The Order of the United States Court of Appeals for the Fourth Circuit on reconsideration of the Order denying rehearing, and denying rehearing en banc, concluding that the initial affirmance of the District Court decision was appropriate in substance and denying the Petition for Rehearing and Suggestion for Rehearing En Banc, is reported as Butler v. Aiken, No. 87-4004 (4th Cir. December 12, 1988). A copy of the Order is attached to the Petition as Appendix C.

JURISDICTION

The Order of the United States Court of Appeals for the Fourth Circuit denying the Petition for Rehearing with Suggestion for Rehearing En Banc was entered December 2, 1988. This Court's jurisdiction is apparently invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fifth Amendment to the United States Constitution, which provides in pertinent part:

> No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ....

COUNTER-STATEMENT OF THE CASE

This matter comes before this Court on federal habeas corpus proceedings arising from a 1981 murder conviction in South Carolina that resulted in a sentence of death on the Petitioner, Horace Butler. The situation involves the July 17, 1980, murder of Pamela Lane in Charleston County, South Carolina.

Miss Lane, a clerk at a convenience store, was last seen alive when she left her place of employment at around 10:30 p.m., on July 17, 1980. She was riding home alone for the first time on her new moped she received that day. She never arrived home.

Her sister reported her missing the next day. A few hours later, her body was discovered by fishermen near a bridge. She had been shot once in the chest by a small calibre pistol. The following day a minister found her moped in a pond near his church.

On August 30, 1980, the Petitioner, Horace Butler, was arrested on an unrelated charge of assault and battery and placed in the County Jail. (J.A. p. 97). He received his "Miranda" warnings on that charge. (J.A. p. 45).

According to post conviction testimony, his sister was called by him and asked "to call Mr. Hill or have his father go see Mr. Hill (a local attorney)." (J.A. p. 1274). Hill was contacted and appeared with him at a bond hearing and agreed to become retained to represent him on the assault charge. He was unable to make bond and he was returned to the County Jail.

At approximately 12:15 a.m., on September 1, 1980, Butler was taken from the jail and transported to the Charleston County Police Department. He was then informed that he was being charged with the murder of Pamela Lane. After receiving the warnings regarding his constitutional rights as required by Miranda v. Arizona, 384 U.S. 436 (1966) (J.A. p. 46), he stated that he understood his rights and then signed two separate waivers during the interrogation. (J.A. pp. 46-50, 58). At no time during any of the interrogation did Butler request the presence of any attorney or particularly McAllister Hill.

Butler offered two explanations of Pamela Lane's death. In his first confession, he claimed that Larry White had killed Lane and sought his help in disposing of the moped. When the police questioned him further, he offered a second confession in which he admitted to killing Lane. According to this statement, he saw Lane riding on her moped and followed her. When he blinked his lights at her, she pulled off the road, hid the moped in the bushes, and voluntarily accompanied him to a nearby wooded area. Butler claimed that Lane engaged in consensual sex with him and said she would "cry rape" when she realized she would get home late. Butler contended that he panicked, shot Lane with a handgun in his possession, and then dumped her body off a bridge. He also claimed Larry White helped him dispose of the moped. After he signed the second confession at 5:45 a.m., he indicated he was not tired and voluntarily led officers to the scenes where he intercepted the victim, where the sexual intercourse and shooting occurred, and where he dumped the body. (J.A. 65). He was returned to jail at about 10:30 a.m., on September 1, 1980.

He was subsequently indicted and brought to trial on murder and sentenced to death. The confession was introduced in the guilt phase after a suppression hearing. Particularly, the trial court found that Butler was afforded his Fifth Amendment rights required by Miranda and that the statements were "voluntary, they were made without coercion on the part of the law enforcement officers, without any threat, without any promise, without any inducement to the defendant ... beyond any reasonable doubt." (J.A. p. 124). Butler's conviction and sentence was upheld on direct appeal. State v. Butler, 277 S.C. 452, 290 S.E.2d 4 (1982). (J.A. 1045). A Petition for Certiorari was denied on

October 12, 1982. In 1983, he unsuccessfully pursued state post conviction relief. The denial of relief was affirmed by the South Carolina Supreme Court and certiorari was again denied by this Court.

On May 2, 1986, Butler filed a Petition for a Writ of Habeas Corpus relief pursuant to 28 U.S.C. § 2254. After pleadings were timely filed, the United States District Court held that it need not consider the applicability of Edwards v. Arizona, 451 U.S. 477 (1981), because the trial had concluded before the Edwards opinion was rendered relying upon Solen v. Stumes, 465 U.S. 638 (1984). (J.A. p. 1640). The District Court granted the Respondents' Motion for Summary Judgment on all other grounds.

In the appeal from the Order of the District Court, the Fourth Circuit held in its panel decision, Butler v. Aiken, 846 F.2d 255 (4th Cir. 1988), that the District Court erred in not applying Edwards, supra, retroactively because Butler's appeal was pending at the time of the decision. Nevertheless, it held that the actions of the Charleston police did not fall within the intent of Edwards. 846 F.2d at 258. It generally held that police initiated questioning about murder did not intrude on defendant's previously invoked right to counsel on an unrelated charge where it was not a sham arrest or "reinterrogation" on the same offense. The Petitioner made a Petition for Rehearing and a Suggestion for Rehearing En Banc that was denied on June 15, 1988. On that same date, this Court issued its decision in Arizona v. Roberson, __U.S.__, 108 S.Ct. 2093 (1988). The Fourth Circuit determined that Butler's Petition for Rehearing should be reconsidered and requested supplemental briefing. On December 2, 1988, the Fourth Circuit ordered that the Petition for Rehearing and

Suggestion for Rehearing En Banc was denied with the panel concluding that "our initial affirmance of the district court decision in this matter was appropriate in substance. (Petition, Appendix C, p. 5).

HOW THE FEDERAL QUESTION WAS DECIDED BELOW

The panel decision of May 6, 1988, found that the District Court erred in ruling that the mandate in Edwards v. Arizona, supra, did not apply to the Petitioner's case and concluded that it should be applied to the Petitioner's case. Butler v. Aiken, 846 F.2d 255, 257. The panel held that the confessions were not obtained in violation of the Fifth Amendment. Relating to the particular facts of this case, it stated:

> We fail to see how the actions of the Charleston police could fall within the intent of the Court in Edwards .... We see no reason for a different result simply because the custody was continuous.
>
> Properly initiated interrogation on entirely new charges does not intrude into an accused's previously invoked rights but rather offers that accused an opportunity to weigh his rights intelligently in light of changed circumstances. When, as occurred in this case, the accused then freely waives any constitutional right to counsel and provides voluntary statements of an incriminating nature, there is no justification for undermining the search for truth by suppressing those statements.

Id. at 258-259.

After the Petition for Rehearing and Suggestion for Rehearing En Banc was denied on June 15, 1988, the matter was reconsidered. Contrary to the assertions of the Petitioner, on December 2, 1988, the panel considered the Petition for Rehearing and was of the opinion that it should be denied. A majority of the active Court voted to deny

rehearing en banc, and it was adjudged and ordered that the Petition for Rehearing and Suggestion for Rehearing En Banc be denied. In its December 2, 1988, Order, Judge Hall stated: "As an initial matter, we reject respondents' effort to distinguish Roberson factually. We assume for purposes of decision that the appearance of counsel with Butler at a bond hearing on the assault charge for which he was arrested conclusively demonstrated invocation of his fifth amendment rights." The subsequent interrogation concerning the Lane murder, occurring during continuous custody, was contrary to the Edwards rule as modified in Roberson. (Order, pp. 2-3). Of particular importance, the Order stated "if this case were before us on direct appeal, we would in all likelihood be compelled to reverse the conviction and remand for a new trial. It does not follow, however, that Butler is entitled to habeas relief based upon a rule of law that was not in effect at the time of his arrest and trial." (Order, p. 3). The Order stated that Butler may not claim any retroactive benefit from Roberson. Relying upon Allen v. Hardy, __U.S.__, 106 S.Ct. 2878, 2880 (1986), the Order stated that Petitioner could not benefit from Roberson.

> The Edwards-Roberson limitations on police interrogation have only the most tangential relationship to truth finding. They are, rather, a part of the prophylactic protection accorded the fifth amendment right to counsel as a means of establishing 'guidelines to the law enforcement profession.' Roberson, 56 U.S.L.W. at 4592. The interrogation of appellant, while unquestionably contrary to the present 'guidelines,' was conducted in strict accordance with established law in 1980 [the date of petitioner's arrest]. We, therefore, conclude that Butler may challenge his presumptively valid conviction only by demonstrating that there was an actual violation of his constitutional rights in 1980. On that dispositive issue, the record discloses no support for Butler's claim for habeas relief.

Order, pp. 3-4.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Arizona v. Roberson, __U.S.__, 108 S.Ct. 2093 (1988), is factually distinguishable from this case because Butler never invoked his right to have counsel present during any interrogation and retained counsel had met with the defendant prior to the questioning on the murder case.

In its Order denying the Petition for Rehearing, Judge Hall assumed for purposes of the Order that Roberson was not factually distinguishable. We submit that the rules in Edwards and Roberson are in fact factually distinguishable. The unique Order in which rehearing was denied presents these resolutions in the Order in a confusing state. Nevertheless, this Court has stated that a prevailing party may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or Court of Appeals." Washington v. Yakima Indian Nation, 439 U.S. 463, 476 n. 20 (1979). Accord Blum v. Bacon, 457 U.S. 132, 137 n. 5 (1982). For the reasons stated below, Respondents submit that certiorari should not be granted.

In Arizona v. Roberson, __U.S.__, 108 S.Ct. 2093 (1988), the Supreme Court held that its earlier test set forth in Edwards v. Arizona, 451 U.S. 477, 484-485 (1981), applies to situations when police want to interrogate a suspect about an offense that is unrelated to an offense that was the subject to their initial interrogation. At the outset, the Court held the Edwards test to be "that a suspect who has expressed his desire to deal with the police only through counsel is not subject to further interrogation until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversation with the police." In Roberson, after arresting Roberson at the scene of a burglary, the arresting

officer advised Roberson of his Miranda rights. Roberson replied that "he wanted a lawyer before answering any questions." The police did not interrogate him any further about that burglary. Three days later, another police officer, who was not aware that Roberson had previously requested a lawyer, advised him of his Miranda rights and obtained an incriminating statement from Roberson concerning a different burglary.

The Supreme Court in Roberson agreed with the state court in concluding that the statement should be suppressed as a denial of his Fifth Amendment right to counsel. It stated that there is no legal significance for Fifth Amendment to the factual distinction of questioning the accused about the same offense after a request for counsel or questioning the accused about an unrelated offense. The Court reasoned that a suspect's request for counsel during an interrogation should apply to any questions the police wish to pose relying upon Colorado v. Spring, 479 U.S. 564, 577 (1987). In Spring, the Supreme Court held that "a suspect's awareness of all the possible subjects of questioning in advance of interrogation is now relevant to determine whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." The Court, in Roberson, stated that Roberson's unwillingness to answer any questions without the advice of counsel, without limiting his request for counsel, indicated that he did not feel sufficiently comfortable with the pressures of custodial interrogation to answer questions without an attorney.

Respondents submit that the Petitioner in his Petition and the Order below has overlooked the difference between the Sixth Amendment right to counsel and the Fifth

Amendment right against self-incrimination. As stated in Roberson, the former arises from the fact that a suspect has been formally charged with a particular crime and thus is facing a state apparatus that has been geared up to prosecute him. The latter is protected by the prophylaxis of having an attorney present to counteract the inherent pressures of custodial interrogation, which arise from the fact of such interrogation and exist regardless of the number of crimes under investigation or whether those crimes have resulted in formal charges.

We submit that Roberson is inapplicable to the instant situation because of two reasons. Initially, unlike Roberson, Butler never invoked his Fifth Amendment right by requesting counsel during any interrogation for either crime. Roberson made a specific statement that he wanted a lawyer before answering any questions. Nowhere in this record does it appear that he invoked his right to remain silent or have counsel present during any further questioning. The record only reflects that counsel had been retained at the time of the bond hearing on the assault charge. The Sixth Amendment right had attached only to the assault charge on any interrogation arising from that charge. Accord Maine v. Moulton, 474 U.S. 159 (1985). In Moulton, the Court noted that even if the state has begun to prosecute an individual on one charge, subsequent "incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at the trial of those offenses." Moulton, supra, 106 S.Ct. 477, 490, n. 16.

Secondly, unlike Roberson, Edwards, or Michigan v. Jackson, 475 U.S. 625 (1986), in which counsel was requested but not provided in consultation, the Petitioner

here had counsel with him during the bond hearing. Simply put, counsel was "made available." Edwards emphasized the necessity of making counsel "available" or of the defendant having "access" to counsel, Edwards, supra, 451 U.S. 484-487, rather than holding that once the accused requests counsel he may thereafter be questioned only in the presence of counsel. See U.S. v. Missler, 414 F.2d 1293 (4th Cir. 1969) (after indictment on a different charge, defendant's incriminating statements made out of counsel's presence did not preclude admission of statement in prosecution for new crime committed after the earlier indictment). In U.S. v. Halliday, 658 F.2d 1103 (6th Cir. 1981), the court held the Fifth Amendment was not violated when counsel was "made available" after a request for counsel under Edwards. Also, the United States Supreme Court in Wyrick v. Fields, 459 U.S. 42 (1982) (per curiam), the Court limited Edwards to the extent that its language was interpreted to not require the "presence" of counsel at an interrogation after he had met with counsel. Cf. Roper v. State, 375 S.E.2d 600 (Ga. 1989).

In Boles v. Foltz, 816 F.2d 1132 (6th Cir. 1987), the Court rejected a Fifth Amendment challenge where a defendant advised the trial court at an arraignment that he had a lawyer and desired him to appear at a preliminary hearing on a larceny charge, but never sought to have him present during any interrogation on the other charges. The Sixth Circuit relied upon Connecticut v. Barratt, 479 U.S. 523 (1987). In Barratt, where a defendant stated he was willing to give an oral statement but would not give a written statement unless his attorney was present, invoked his right to counsel for purposes of the interrogation. In Boles, however, the Court found that he did not invoke his

right to have counsel present during an interrogation where his statement at the arraignment was that he wished to have his attorney present at the preliminary hearing.

In summary, Arizona v. Roberson should not affect this case because Horace Butler never invoked his Fifth Amendment right by requesting counsel to assist in any interrogation. Counsel merely appeared with his client at an unrelated bond hearing and consulted, although the information exchanged during the consultation has varied in the various proceedings. Since no Sixth Amendment right had attached on the murder charges and the Petitioner never sought to have counsel "made available" after his consultation after the bond hearing, we submit that the mandate of Roberson and Edwards has not been violated. Therefore, we submit that the Writ of Habeas Corpus was properly dismissed and denied because the Petitioner's constitutional rights were not infringed and certiorari should be denied.

2. Assuming that Roberson factually applies to the situation, the Fourth Circuit correctly stated in its Order. sua sponte, that it does not have retroactive application.

In its Order of December 3, 1988, denying the Petition for Rehearing and Suggestion for Rehearing En Banc, Judge Hall stated that "we are fully satisfied that Butler may not claim any retroactive benefit from Roberson." The Order concluded that the interrogation was conducted in strict accordance with established law in 1980, and that there was no support that there was an "actual violation of his constitutional rights in 1980." (Order, pp. 3-4). As the Order stated:

> It is undisputed that local authorities provided full Miranda warnings before questioning Butler on the Lane murder.

> It is further undisputed that Butler twice evidenced his knowing consent to interrogation without the presence of counsel by executing signed waivers. Every court that has considered this matter has concluded that the waiver of rights was uncoerced and utterly voluntary. There is, therefore, no reason to find a technical violation based upon newly announced law when the record reveals that the appellant freely waived any fifth amendment protections in 1980.

The Order of the Fourth Circuit reflects its sua sponte determination that the decision in Arizona v. Roberson, supra, established new guidelines for law enforcement and did not have more than the most tangential relationship to truth finding.

This Court has recently looked at retroactivity in its decision in Teague v. Lane, __U.S.__, 44 CRIM.L.RPTR. 3129 (February 22, 1989). Justice O'Connor wrote that in habeas corpus the issue of retroactivity should be a threshold question "for, once a new rule is applied to the defendant in the case announcing the rule, even-handed justice requires that it be applied retroactively to all those similarly situated." In her opinion, a new rule for retroactivity purposes is when it breaks new ground or imposes a new obligation on the States or Federal Government. "To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." 44 CRIM.L.RPTR. at 3133, citing Truesdale v. Aiken, 480 U.S. 527, 528-529 (1987) (Powell, J., dissenting).

In the habeas corpus context, Justice O'Connor's analysis adopted Justice Harlan's view of retroactivity set forth in Mackey v. U.S., 401 U.S. 667, 675 (1971), for cases on collateral review. Particularly, she noted the frustration of state courts to faithfully apply existing

constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands. In Teague, two exceptions to the general rule on nonretroactivity were stated:

> (1) a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law making authority to proscribe;" and
>
> (2) a new rule should be applied retroactively if it requires the observance of "those procedures that ... are implicit in the concept of ordered liberty."

For retroactivity analysis, the threshold question is whether the rule announced is a new rule. In Yates v. Aiken, 484 U.S.__ (1988), the Court held the rule announced in a habeas corpus setting in Francis v. Franklin, 471 U.S. 307 (1985), was not a "new rule" because it was merely an application of the principal that governed the decision in Sandstrom v. Montana, 442 U.S. 510 (1979). Accord Shea v. Louisiana, 470 U.S. 51 (1985) (giving Edwards retroactive application on direct but not collateral review).

Here, the Order below determined that the rule of Arizona v. Roberson announced a new rule by setting new guidelines for law enforcement officers by requiring the preclusion of any interrogation on unrelated conduct after a suspect in custody had invoked his right to counsel on the subject of his custody. The Supreme Court had never addressed that setting although some other state courts had held that it was not a constitutional violation. State v. Dampier, 314 N.C. 292, 333 S.E.2d 230 (1985); McFadden v. Commonwealth, 300 S.E.2d 924 (Va. 1983); Lofton v. State, 471 S.E.2d 1294 (Fla. App. 1985); State v. Newton, 682 P.2d 295 (Utah 1984). Roberson, supra, 108 S.Ct. 2093, 2097, n. 3. As Roberson acknowledged, the statements deemed

inadmissible in Edwards and later cases applying its doctrine were statements relating to the same investigation in which the right to counsel was invoked. Roberson, supra, at 2102. As the dissent in Roberson noted, this new rule will bar law enforcement officials, even those from other city, state or federal jurisdictions, from questioning a suspect about an unrelated matter if he is in custody and has requested counsel to assist in answering questions put to him about the crime for which he was arrested. Id.

The Petitioner contends that the lower court did not apply Edwards retroactively. (Petition, p. 11). We disagree. As stated in the panel decision, the Fourth Circuit unequivocally applied Edwards to the Butler - situation. 846 F.2d at 257. The Court, in reconsideration of the Petition for Rehearing, stated that it would not apply the mandate of this Court's decision in Roberson to the Butler setting.

Since Roberson established new guidelines for law enforcement, we submit that it should not be applied to collateral review since it does not fall within the two exceptions set forth in Justice O'Connor's opinion in Teague. Application of the rule in Roberson would not accord constitutional protection to any primary, private individual conduct nor create the watershed rule of criminal procedure Mackey, supra, was concerned with. Here, the suspect received oral warnings pursuant to Miranda and signed two written waivers of his constitutional rights, including his right to have counsel appointed or assist in the interrogation. In this record, at no time did he ever request counsel to assist the interrogation for this crime or the unrelated crime he was in custody for before or during the interrogation. Simply put, this case does not

present the concerns of "badgering" or coerciveness that Roberson was concerned with remedying. Now, almost nine years after the interrogations, the Petitioner seeks to have a technical change applied to him where the evidence is undisputed that he waived his right to have counsel assist. Certiorari on these issues, we submit, are unwarranted.

CONCLUSION

For all of the foregoing reasons, we submit that his Petition for Certiorari should be dismissed.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

* DONALD J. ZELENKA
Chief Deputy Attorney General

ATTORNEYS FOR RESPONDENT

By: [signature]

* Counsel of Record

April 7, 1989
Columbia, South Carolina

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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he served the foregoing Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit on the Petitioner by depositing three copies of the same in the United States Mail, first class postage prepaid, and addressed to John H. Blume, Esquire, South Carolina Death Penalty Resource Center, Post Office Box 11311, Columbia, South Carolina 29211. He further certifies that all parties required to be served have been served.

This 7th day of April, 1989.

Donald J. Zelenka

SWORN to before me this

7th day of April, 1989.

(LS)
Notary Public for South Carolina
My Commission Expires: 4-14-97.

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AFFIDAVIT OF FILING

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he is a member of the Bar of this Court and that on this date he filed the original and ten copies of Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit in the above captioned case by depositing same with Federal Express, prepaid, and properly addressed to the Clerk of this Court.

This 7th day of April, 1989.

Donald J. Zelenka

SWORN to before me this

7th day of April, 1989.

(LS)
Notary Public for South Carolina
My Commission Expires: 4-14-97.